

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PAMELA J. BANKA)	
Claimant)	
VS.)	
)	Docket No. 175,137
SECURITY BENEFIT GROUP, INC.)	
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Respondent requested Appeals Board review of the February 11, 1997, Award entered by Special Administrative Law Judge William F. Morrissey. The Appeals Board heard oral argument on July 23, 1997.

APPEARANCES

Respondent and its insurance carrier appeared by their attorney, Gregory D. Worth of Lenexa, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Anthony D. Clum, appearing for John C. Peterson of Topeka, Kansas. Claimant appeared not as she had settled her claim with respondent on March 2, 1995. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award of the Special Administrative Law Judge.

ISSUE

The only issue for review by the Appeals Board is the liability of the Kansas Workers Compensation (Fund).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

Claimant claimed workers compensation benefits for injuries she received in two separate work-related accidents while employed by respondent. Claimant alleged an initial injury to her right lower back, buttock, and leg when she leaned forward and twisted, shutting off a fan under her desk on June 1, 1992. Claimant alleged she re-injured her low back at work on December 24, 1992, when she got up off the floor to answer the telephone and felt a twinge in her back.

Respondent and claimant settled both claims for workers compensation benefits in a settlement hearing before a special administrative law judge on March 2, 1995. The settlement hearing transcript is contained in the record of evidence in this case. Claimant had filed two separate applications for hearing before the Division of Workers Compensation. The first alleged accidental injury on June 1, 1992, and was assigned Docket No. 166,465. The second alleged accidental injury of December 24, 1992, and was assigned Docket No. 175,137. Both of those claims were settled on a strict compromise based on a 15 percent permanent partial disability of the body as a whole for a lump sum amount of \$15,652.71. The settlement included payment of 18 weeks of temporary total compensation, 7 weeks of temporary partial compensation, and all authorized medical treatment to the date of the settlement hearing which included \$6,265.76 of medical expenses incurred following the December 24, 1992, accident.

Before the settlement, the respondent impleaded the Fund as a party in Docket No. 175,137. At the settlement hearing, all issues between respondent and Fund were reserved for future determination. Respondent's claim for reimbursement by the Fund is only for the alleged December 24, 1992, accident. Respondent claims the Fund is responsible for all of or a portion of the December 24, 1992, accident to the extent that it contributed to claimant's overall resulting disability, plus all of the temporary total disability compensation and medical expenses associated with the December 24, 1992, accidental injury.

The settlement hearing transcript and the medical records attached thereto do not provide evidence to apportion the 15 percent permanent partial disability between the June 1, 1992, and the December 24, 1992, accidents. Also, temporary total disability payments set forth in the settlement worksheet do not specify what dates claimant was disabled. However, the regular hearing transcript does specify the dates paid and none of the weeks of temporary total disability were paid after the December 24, 1992, accident.

As previously noted, the record does indicate that \$6,265.76 of medical expenses were paid for treatment of claimant's injury following the December 24, 1992, alleged accident. Those medical expenses were separated out in an exhibit to respondent's submission letter.

For the respondent to shift all or a portion of its liability to the Fund, it has the burden to prove claimant was a handicapped employee after the June 1, 1992, accident, that claimant was retained with respondent's knowledge of the handicap, and claimant sustained a second injury on December 24, 1992. See Brozek v. Lincoln County Highway Dept., 10 Kan. App. 2d 319, 698 P.2d 392 (1985). The Appeals Board will address first whether respondent has met its burden of proving claimant suffered a second work-related injury on December 24, 1992.

The Special Administrative Law Judge found the incident that claimant described at work on December 24, 1992, caused only a temporary exacerbation of claimant's preexisting symptoms and did not cause additional injury. Furthermore, the Special Administrative Law Judge found that, if claimant did suffer an injury or a re-injury to her low back on December 24, 1992, such injury more probably was due to an intervening incident that claimant suffered at her mother's home on the same day. For reasons set forth below, the Appeals Board agrees with the Administrative Law Judge and finds the Fund has no liability for any portion of the settlement of claimant's claim for workers compensation benefits reached between respondent and claimant on March 2, 1995.

Specifically, claimant's testimony established that she remained symptomatic following her June 1, 1992, accident until she felt a twinge in her low back as she was getting off the floor to answer the telephone at work on December 24, 1992. Although claimant testified she had to ice her back because of the increased pain following this incident, she also testified that the most severe pain and discomfort in her low back occurred that evening at her mother's house. Claimant testified the incident at her mother's house caused her back to seize up and she was immobilized as she leaned over and twisted when getting two D batteries out of a closet for her brother. Claimant's opinion was that the two incidents that occurred on December 24, 1992, exacerbated or reactivated the June 1, 1992, injury.

Sharon L. McKinney, D.O., board-certified in physical medicine and rehabilitation, examined claimant for her low back injury on January 17, 1994, and July 26, 1994. Dr. McKinney was the only physician to testify in this case. Dr. McKinney was asked whether the incident that claimant suffered in December of 1992 at work caused any worsening of claimant's condition that existed prior to December 1992 or did the incident just set back the healing process. Dr. McKinney replied that she would call it an exacerbation and her condition remained the same. Dr. McKinney also opined that claimant's original injury was the primary event that caused her to have increased symptoms on December 24, 1992, and not the incident either at work or at her mother's house.

The Appeals Board concludes that respondent failed to prove it is more probably true than not that claimant sustained a new and distinct low back injury while she was working for respondent on December 24, 1992. The Appeals Board finds claimant's testimony and Dr. Sharon C. McKinney's testimony support the conclusion that the incident that occurred at work on December 24, 1992, only temporarily aggravated claimant's preexisting symptoms and did not result in an additional permanent injury. Furthermore, the Appeals Board finds that if claimant did suffer a re-injury to her low back on December 24, 1992, the more persuasive evidence is that the accident that occurred at her mother's house caused the re-injury and not the incident at work.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey, dated February 11, 1997, that denied respondent's request to shift all or part of the liability for the cost of the settlement between respondent and claimant to the Fund, is affirmed.

All remaining orders contained in the Award of the Special Administrative Law Judge are adopted by the Appeals Board as if specifically set forth herein.

IT IS SO ORDERED.

Dated this ____ day of September 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gregory D. Worth, Lenexa, KS
John C. Peterson, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director